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IN THE

Supreme Court of the United States

October Term, 1935

No. 303

ALICE LEE GROSJEAN, Supervisor of Public Accounts,
Appellant,

v.

AMERICAN PRESS COMPANY, INC., et al.,
Appellees.

APPELLEES' BRIEF

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AMERICAN PRESS COMPANY, INC., et al.,
Appellees.

APPELLEES' BRIEF

Opinion Below

A District Court, specially constituted under Section 266 of the Judicial Code as amended (U.S.C.A., Title 28, Sec. 380) for the Eastern District of Louisiana, Baton Rouge Division, rendered an opinion sustaining the petition of these appellees for an interlocutory decree enjoining appellant from enforcing Act 23 of the Legislature of Louisiana of 1934 against them. The opinion of the District Court appears at R. 93, and is reported in 10 F. Supp. at p. 1061. Thereafter a stipulation was filed that the case be submitted for final decision without further argument on the same pleadings and evidence as was produced at the hearing upon the application for a prelimi-

nary injunction. (R. 99). Thereupon, the Court entered the decree of permanent injunction (R. 100); and defendant has appealed therefrom.

Statutes Involved

The statutes involved are so lengthy that for convenience they are included in Appendix A of this brief. The constitutional provisions are also included in Appendix A. Request is made that the statutes and the constitutional provisions be read as a part hereof.

The statutes are:

Act 23 of the Louisiana Legislature, 1934.

Paragraph 1 of Section 24 of the Judicial Code as amended. (U.S.C.A. Title 28, Sec. 41 (1st).)

Paragraph 14 of Section 24 of the Judicial Code as amended. (U.S.C.A. Title 28, Sec. 41 (14).)

Section 266 of the Judicial Code as amended. (U.S.C.A. Title 28, Sec. 380.)

The constitutional provisions are:

Section 3 of Article I of the Constitution of the State of Louisiana.

The First Amendment to the Constitution of the United States.

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Section 8 of Article X of the Constitution of the State of Louisiana.

Statement of the Case

Appellees do not rely upon the statement of the case in appellant's brief and submit the following statement:

Each of the nine appellees is a Louisiana corporation and owns and publishes one or more newspapers (thirteen in all) in various cities of Louisiana. Appellant is the Supervisor of Public Accounts of the State of Louisiana, and, as such, is charged with the duty of administering

and enforcing the provisions of Act 23 of the Louisiana Legislature of 1934. (Acts, State of Louisiana, Regular Session 1934, page 176.)

Appellees attacked the constitutionality of said Act upon the following grounds (R. 6):

(1) That it violates the provisions of Section 8 of Article X of the Constitution of Louisiana of 1921, relative to the imposition of license taxes;

(2) That it violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, guaranteeing to all persons the equal protection of the laws;

(3) That it violates the provisions of Section 3 of Article I of the Constitution of Louisiana of 1921, that: "No law shall ever be passed to curtail or restrain the liberty of speech, or of the press;"

(4) That it violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which amendment secures against state action that freedom of the press guaranteed by the First Amendment to the Constitution of the United States.

The District Court held that said Act violates the provisions of Section 8 of Article X of the Constitution of Louisiana, and the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, and deemed it unnecessary to pass upon the question of whether said Act violated the freedom of the press provisions of the State and Federal Constitutions (R. 97).

The statute complained of is set forth in full in the appendix to this brief. (p. 39 ff.) The relevant provisions having an important bearing on this case, may be summarized as follows:

> (a) "That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, maga-

zine, periodical or publication whatever, having circulation of more than twenty thousand (20,000) copies per week, or displayed and exhibited, or to be displayed and exhibited by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent (2%) of the gross receipts of such business." (Section 1, (a));

(b) All persons subject to said Act must, on the first day of October, 1934, and every three months thereafter, file with the Supervisor of Public Accounts, a sworn report showing the amount of gross receipts for its business during the preceding three months (except that the report due October 1, 1934 shall be for the period from August 1st to September 30th, 1934), and shall accompany such report with a remittance to said Supervisor of Public Accounts of the amount of the tax due as shown thereby. (Secs. 2 and 4);

(c) The taxes become due on the last day of each quarter, and bear interest at the rate of one per cent (1%) per month from their due date. (Sec. 7);

(d) In case it becomes necessary to enforce payment by suit, the Supervisor of Public Accounts is entitled to recover in said suit twenty-five per cent (25%) of the amount of the tax and interest, as attorney's fees. (Sec. 8);

(e) "It shall be unlawful for any person, firm, association or corporation, required to file a report or to pay a tax by this Act, or by any regulation issued under authority thereof, or any managing agent or officer of any such firm, association or corporation

(1) To fail, neglect or refuse to file the aforesaid sworn report at the time and in the manner and form prescribed, or to pay any tax due under this Act prior to its becoming delinquent; and

(2) To make any false statement in said sworn report, or to make any false representations to the Supervisor of Public Accounts as to any tax levied by this Act.

And any person violating any provision of this Act

shall be deemed guilty of a misdemeanor and, on conviction, shall be fined not exceeding five hundred dollars ($500.00), or imprisoned not exceeding six (6) months, or both, in the discretion of the court, for each violation.

As to corporations violating this Act there shall be recovered, at the suit of the District Attorney an amount not exceeding five hundred dollars ($500.00) for each violation." (Sec. 9.)

The record shows that The Times-Picayune Publishing Company would have to pay a tax under said Act for the first period of two months ending September 30, 1934, amounting to in excess of Three Thousand ($3,000.00) Dollars (R. 38); that the tax to be paid by Item Company, Limited, for each quarter period, would exceed the sum of Three Thousand ($3,000.00) Dollars (R. 24); and that Capital City Press, Journal Publishing Company, Inc., News-Star-World Publishing Company, Inc., and Times Publishing Company, Limited, would each have to pay a tax exceeding Three Thousand ($3,000.00) Dollars per annum (R. 20, 26, 35, 41). The record also shows that the gross receipts of the other three plaintiffs for the period from October 1, 1933, to September 30, 1934, were as follows:

American Press Company, Inc. $82,613.00 (R. 18);
McCormick & Company, Inc. $93,012.00 (R. 33);
Lafayette Advertiser-Gazette, Inc. $40,595.00 (R. 28).

There are approximately one hundred and sixty-three (163) publications published in the State of Louisiana selling and publishing advertising. Only thirteen (13) of these one hundred and sixty-three (163) publications have a circulation of more than twenty thousand (20,000) copies per week, and these thirteen (13) publications are newspapers owned and published by appellees. The tax sought to be imposed by Act 23 of 1934 affects these thirteen (13) newspapers alone. All other publications are exempted from the operation of the statute (R. 50).

There are four daily newspapers published within the State of Louisiana having a circulation of but slightly less than twenty thousand (20,000) copies per week: "The Ruston Leader," published in the City of Ruston, Louisiana; "The Hammond Courier," published in the City of Hammond, Louisiana; "The Crowley Signal," published in the City of Crowley, Louisiana; and "The Morning Advocate," published in the City of Baton Rouge, Louisiana. All four of these newspapers compete with the newspapers of appellees, except that "The Morning Advocate" does not compete with "The Baton Rouge State-Times," as both of said newspapers are owned by the same corporation (R. 50).

There are approximately one hundred and twenty (120) weekly newspapers published in the State of Louisiana and circulated throughout the State, but none of them has a circulation as large as 20,000 copies per week. Said newspapers also compete with the newspapers of appellees, both as to circulation and advertising, and especially as to judicial advertising (R. 17, 19, 22, 24, 31, 34, 36, 38).

The business of newspapers is the gathering and dissemination of information in the form of news, editorial comment and advertising. Newspapers are dependent, in large measure, for the conduct of their business on the revenue from the advertising published therein (R. 54).

For many years it has been, and now is, substantially if not universally, the custom of the newspapers of the United States, to sell their publications to subscribers and readers at far less than the cost of production, with the result that circulation revenue meets only a portion of the cost which newspapers must incur to perform the functions of the press (R. 54).

In order to sell newspapers in that manner and so as to give the widest dissemination to the information which they offer, it is necessary to depend on advertising revenues to meet the major cost of production. Any factor which affects advertising revenue corre-

spondingly and directly affects the ability of newspapers to serve their readers and to perform their duties and functions to the public (R. 54).

Throughout the United States, and in the State of Louisiana, there are six principal media of advertising, to-wit: (1) Newspaper advertising; (2) Magazine advertising; (3) Radio broadcast advertising; (4) Outdoor advertising (principally billboards); (5) Street car card advertising; and (6) Motion picture advertising. The amount spent during the year 1933 throughout the United States for such advertising was approximately as follows: (R. 50).

(1) Newspaper advertising	$453,000,000.00
(2) Magazine advertising	137,000,000.00
(3) Radio broadcast advertising	57,000,000.00
(4) Outdoor advertising	40,000,000.00
(5) Street car card advertising	11,000,000.00
(6) Motion picture advertising Less than	10,000,000.00
Total	$708,000,000.00

The revenues of newspapers are derived almost entirely from monies paid by regular subscribers to or purchasers of said publications, and from monies paid for the insertion of advertisements in said publications. The revenue derived from circulation is a substantial part of the total revenue, and varies materially in its ratio to advertising revenue with respect to the particular publication (R. 51).

While volume of circulation is a factor in fixing advertising rates, it is only one of several factors. The character of circulation, the competitive conditions in the particular territory served by the newspaper, the economic conditions prevailing in the territory, and other factors, are of great importance. Hence, it frequently results that a daily newspaper with a much smaller volume of circulation than another has advertising rates as high as, and in some instances, considerably higher than, those of the other newspaper having a greater circulation, and, ac-

cordingly, obtains an annual income from advertising published in its columns larger than that obtained by the other newspaper of greater circulation (R. 51).

For some time prior to the convening of the Regular Session of the Legislature of Louisiana for the year 1934, and throughout said Session, all of the newspapers published by appellees, except "The Lake Charles American-Press" had been actively opposing, in their editorial policies, the dominant political faction in the State of Louisiana, known as the "Long Faction." "The Lake Charles American-Press," while never an open proponent of said faction, did not take an active editorial stand in opposition thereto until shortly after the convening of said Regular Session, since which time it has maintained an opposition policy. The "Long Faction" had been headed for some years by the late Huey P. Long, ex-Governor of the State, and former United States Senator from the State. This faction dominates and controls all of the executive departments of the State. The present Governor, Oscar K. Allen, is a member and one of the leaders of said faction, and a majority of the members of the Legislature of 1934 were members of said faction during said session (R. 42).

The newspapers published by the appellees have, from time to time, in their editorials, severely criticized the political practices and policies of the "Long Faction" and for some time prior to, and during, the Regular Session of the 1934 Legislature there had been open and vigorous opposition by said newspapers to the policies and practices of said faction. The leaders and various members of said faction, during said time, openly and vehemently denounced said newspapers in political addresses and speeches on the floor of the Legislature, and in circulars widely distributed through employees of the various state departments under their control, and threatened the newspapers with taxation on their advertising (R. 42).

During said Regular Session of the Legislature of 1934,

after the introduction and prior to the final passage of Act No. 23, a circular was issued over the names of Governor Oscar K. Allen and the late Senator Huey P. Long, and was widely distributed throughout the State. Copies thereof were laid on the desk of each member of the Legislature during its Regular Session of 1934 while said Act No. 23 was under consideration. This circular contained the following language:

> "The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2% on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2c a lie" (R. 43).

On or about September 24th, 1934, in a public address delivered in Sulphur, Calcasieu Parish, Louisiana, the late Senator Long, speaking for the dominant political faction of the State, said:

> "There was only one newspaper in the State that had not joined up with the gang opposing me and that was 'The Lake Charles American-Press.' Well, we tried to find a way to exempt 'The Lake Charles American-Press' from the advertising tax, but did not think we could do it, but we would have done it if we could" (R. 43).

The State of Louisiana has never heretofore attempted to impose a license tax on newspapers.

Summary of Argument

The District Court had jurisdiction to determine the questions presented, including those raised under the Constitution of Louisiana.

The case presented called for the exercise of jurisdiction by a court of equity.

The statute violates the provisions of Section 8 of Article X of the Constitution of Louisiana of 1921, which requires that license taxes must be levied on all persons engaged in the trade, business, occupation, vocation or profession upon which a license tax is imposed.

The Act violates the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in that it denies appellees the equal protection of the laws.

The Act violates the provisions of the Constitution of Louisiana and of the Constitution of the United States guaranteeing freedom of the press.

ARGUMENT

I.

Jurisdiction

(A) The District Court Had Jurisdiction to Determine the Questions Presented, Including Those Raised Under the Constitution of Louisiana.

The District Court had jurisdiction on two separate and distinct grounds, to-wit, under Paragraph 1 and under Paragraph 14 of Section 24 of the Judicial Code (U.S.C.A., Title 28, Sec. 41).

The first paragraph of said section gives the District Court jurisdiction "of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3000, and . . . arises under the Constitution or laws of the United States . . ." This paragraph concludes with the following sentence: "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

Paragraph 14 of this section gives the District Court jurisdiction "of all suits at law or in equity authorized by law to be brought by any person to redress the de-

privation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States: . . ." As heretofore pointed out, a suit would lie under this paragraph without regard to "the sum or value of the matter in controversy."

Jurisdictional Amount Unnecessary in This Case

There is no question but that the alleged deprivation of the rights of appellees is under color of a law of the State of Louisiana. The question is whether the right of which each appellee is deprived is a "right," secured by the Constitution of the United States.

It is settled that freedom of speech and of the press are among the fundamental "personal rights" and "liberties" safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.

Near v. *Minnesota*, 283 U. S. 697 (1931);
Stromberg v. *California*, 283 U. S. 359 (1931);
Gitlow v. *New York*, 268 U. S. 652 (1925);
Whitney v. *California*, 274 U. S. 357 (1927).

As said by this court in *Near* v. *Minnesota*:

> "It is no longer open to doubt that the liberty of speech and of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guarantee of fundamental rights of person and property."

It is equally well settled that a corporation is a "person" within the meaning of the due process and equal protection clauses of the Fourteenth Amendment.

Liggett Co. v. *Baldridge*, 278 U. S. 105 (1928).

The case of *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), is decisive of this question. That was a suit

brought by a corporation, which operated a parochial school, to enjoin a statute of Oregon, requiring that all children must attend the public schools, as unreasonably interfering with the liberty of parents and guardians to direct the upbringing and education of children under their control. The court sustained the attack on the statute as against the direct contention that this question could not be raised by a corporation; but could only be raised by the parents of the children. This court said:

> "Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the 14th Amendment guarantees. Accepted in the proper sense, this is true. Northwestern Life Ins. Co. v. Riggs, 203 U. S. 243, 255; Western Turf Asso. v. Greenberg, 204 U. S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action."

In the light of the foregoing, it is submitted that the case presented is one within the purview of Paragraph 14 of Section 24 of the Judicial Code, and that the District Court had jurisdiction thereunder as to each of these appellees, without regard to the "sum or value of the matter in controversy."

Raich v. *Truax,* 219 Fed. 273 (1915), aff'd,
Truax v. *Raich,* 239 U. S. 33 (1915);
Crane v. *Johnson,* 233 Fed. 334 (1916), aff'd in 242 U. S. 339 (1917);
Schlosser v. *Welsh,* 5 F. Supp. 993 (1934).

Jurisdictional Amount Present, in Any Event, as to at Least Six of the Appellees

The test of jurisdiction under Paragraph 1 of Section 24 of the Judicial Code is that the total amount of the tax demanded, or which may be demanded, within any time

reasonably required to conclude the litigation, exceeds the jurisdictional amount. *Healy* v. *Ratta*, 292 U. S. 263 (1934). Eighteen months have already elapsed since the taxes sought to be imposed by Act 23 of 1934 began to accrue. The amount of the tax accruing during the first twelve months was in excess of Three Thousand Dollars ($3,000.00) as to each of the appellees, except American Press Company, Inc., McCormick & Company, and Lafayette Advertiser-Gazette. The amount of the tax for the eighteen months period as to American Press Company, Inc. and McCormick & Company is in excess of Twenty-five Hundred ($2,500.00) Dollars, if calculated on the basis of their gross receipts for the period from October 1, 1933, to September 30, 1934; and the record shows that the gross receipts for the twelve months period ending September 30, 1935 will be in excess of the receipts for the previous twelve months period. There can, therefore, be no doubt that the Court had jurisdiction under Paragraph 1 of Section 24 of the Judicial Code as to all of the appellees except the three named above; and it would appear that under said provision the Court had jurisdiction, also, as to American Press Company, Inc. and McCormick & Company.

Even if jurisdiction would not have existed, if the suit had been brought by the three above named appellees alone, the three above named appellees were entitled to join as co-plaintiffs with the other appellees, in order that the entire subject matter of the litigation might be once and for all time, in one action, settled as between the parties interested therein. If the statute is void as to one appellee it is void as to every other appellee. Every appellee is within the terms of the statute and the issues of fact and law applicable to one appellee are applicable to every other appellee. If the jurisdictional amount in controversy exists as to one appellee, others interested in obtaining the object sought in the suit, to have the statute declared void, can join as co-plaintiffs even though with

respect to these latter the jurisdictional amount is not involved. This follows under Equity Rule No. 37 and under cases holding that where a tax-levying statute is sought to be declared unconstitutional any number of taxpayers taxed thereby can join as plaintiffs, and jurisdiction as to each exists, if the jurisdictional amount exists as to any one of them. Examples are *Gramling* v. *Maxwell,* 52 F. (2d) 256 (1931), and *Everglades Drainage League et al.* v. *Drainage District,* 253 Fed. 246 (1918), both proceedings to enjoin under Section 266 of the Judicial Code taxes levied by State legislatures, and from the latter of which decisions we quote as follows:

> "This exhibit, therefore, shows the jurisdictional amount in controversy in Broward County between one of the complainants and all the defendants except the Tax Collector of Dade County. This being so, the joinder of the other parties complainant and the tax collector of Dade County as defendant, ceases to be a jurisdictional question; and the motion to dismiss the bill for want of jurisdiction will be denied."

The District Court Had Jurisdiction to Decide Non-Federal Question Where Substantial Federal Question is Also Involved.

The jurisprudence of this Court is settled to the effect that while a Federal Court may not assume jurisdiction of a separate and distinct non-Federal cause of action, because it is joined in the same complaint with the Federal cause of action, yet, where two distinct grounds in support of a single cause of action are alleged, only one of which presents a Federal question, and the Federal question brought is not plainly wanting in substance, the Federal Court, even though the Federal ground be not established, may, nevertheless, retain and dispose of the case upon the non-Federal ground. This rule applies to hearings on applications for injunctions under the provisions of Section 266 of the Judicial Code, as well as to cases in general in the United States District Court. (*Hurn* v.

Oursler, 289 U. S. 238 (1933); *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593 (1926); *Binderup* v. *Pathe Exchange*, 263 U. S. 291 (1923); *Louisville & Nashville Railroad* v. *Garrett*, 231 U. S. 298 (1913); *Siler* v. *Louisville & Nashville Railroad Co.*, 213 U. S. 175 (1909); *Lincoln Gas & Electric Co.* v. *Lincoln*, 250 U. S. 256 (1919).

We feel confident that in the latter portion of this brief appellees demonstrate that the state statute violates the Federal Constitution in both of the respects claimed. Certainly, the Federal questions presented are substantial, and are sufficient to give jurisdiction.

(B) The Case Presented Called for the Exercise of Jurisdiction by a Court of Equity.

The general rule in Louisiana is that a suit will not lie to recover taxes paid under protest. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813 (1929), wherein this Court said:

> "The statute provides for the enforced payment of the tax quarterly in each year. If the tax be paid during the pendency of the suit, and the statute be adjudged invalid by the final decree, the plaintiff will be remediless. The laws of the State afford no remedy whereby restitution of the money so paid may be enforced, even where the payment is under protest and compulsion."

The statement above quoted presents a precise picture of the situation which confronted these appellees. It is true that Section 5 of Act 23 of 1934 provides that: "In cases where it is established to the satisfaction of the Supervisor of Public Accounts that a payment or payments have been made under this Act that were not due and collectible the Supervisor of Public Accounts is authorized to refund such payments out of any funds on hand, collected by virtue of this Act, and not remitted to the State Treasurer according to law." But this provision clearly relates only to cases where the taxpayer has miscalculated the amount of the tax and would not au-

thorize a refund on the ground that the law itself is invalid. Moreover, there is no method to compel the refund to be made, as the question is left entirely to the discretion of the Supervisor of Public Accounts. The refund is provided for only "where it is established to the satisfaction of the Supervisor of Public Accounts" that a refund is due. Finally, the refund can only be made "out of any funds on hand collected by virtue of this Act, and not remitted to the State Treasurer according to law." And Section 11 of the Act provides that "The Supervisor of Public Accounts shall make remittance to the State Treasurer, not later than the 30th day after the last day of the preceding quarter."

Act 16 of the Second Special Session of 1934 has no bearing on the case at bar:

(1) Because it was adopted several months after the filing of this suit, and equity jurisdiction was not lost, because since the filing of the bill an adequate legal remedy may have become available.

Dawson v. *Kentucky Distilleries Co.*, 255 U. S. 288, 295 (1921).

(2) Because it does not afford an adequate remedy at law.

Atlantic Coast Line R. R. v. *Daughton*, 262 U. S. 413 (1923);

Educational Films Corp. of America v. *Ward*, 282 U. S. 379 (1931).

The statute in question does not authorize the bringing of a suit to procure reimbursement, nor does it authorize repayment, with interest. The only section of the statute which could possibly be urged as applicable to the present case is the provision of paragraph 2 thereof that: "The State Treasurer, or the treasurer of any political subdivision, shall pay and reimburse the taxpayer the amount of the tax so declared to be illegal, out of any funds in his possession, under his control, or on deposit in such

treasury, derived from the same source as the tax involved in such litigation"

There is no assurance that if all or any of the appellees paid this tax to the Supervisor of Public Accounts and then brought suit to recover it, there would, at the termination of this suit, be in the hands of the State Treasurer any amount, derived from said tax. Indeed, the entire provision can well be construed as merely imposing a duty upon the State Treasurer left entirely within his discretion, and dependent upon the circumstances of the particular case.

Moreover, equity jurisdiction can be predicated in this case upon the sole ground of avoiding a multiplicity of suits. The issues of law and of fact are the same between these nine appellees and the State of Louisiana. If the injunction had not been granted, nine civil suits could have been brought against appellees each three months, and during each such period eighteen criminal proceedings could have been brought against the appellees and a like number against their principal officers.

Matthews v. *Rodgers*, 284 U. S. 521 (1932).

Sections 265 and 266 of the Judicial Code Do Not Prohibit the Relief Granted by the Lower Court

Section 265 of the Judicial Code (U. S. C. A., Title 28, Sec. 379), provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

Section 266 of the Judicial Code (U. S. C. A., Title 28, Sec. 380), contains a provision that: "If before the final hearing of such application" (the application for the interlocutory injunction) "a suit shall have been brought in a court of the state having jurisdiction thereof under

the laws of such state, to enforce such statute or order, accompanied by a stay in such state court of proceedings under such statute or order, pending the determination of such suit by such state court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the state. Such stay may be vacated upon proof made after hearing and notice of ten days, served upon the Attorney General of the state that the suit in the state courts is not being prosecuted with diligence and good faith."

This Court, in *Wells Fargo & Co.* v. *Taylor*, 254, U. S. 175, 183 (1920), referred to the provisions of Section 265 of the Judicial Code, and said:

> "The provision has been in force more than a century, and often has been considered by this court. As the decisions show, it is intended to give effect to a familiar rule of comity, and, like that rule, is limited in its field of operation. Within that field it tends to prevent unseemly interference with the orderly disposal of litigation in the state courts and is salutary; but to carry it beyond that field would materially hamper the Federal courts in the discharge of duties otherwise plainly cast upon them by the Constitution and the laws of Congress, which, of course, is not contemplated. As with many other statutory provisions, this one is designed to be in accord with, and not antagonistic to, our dual system of courts. *In recognition of this it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts from enjoining the institution in the state courts of proceedings to enforce local statutes which are repugnant to the Constitution of the United States.* Ex parte Young, 209 U. S. 123; Truax v. Raich, (supra.)" (Emphasis supplied.)

The recent decisions of this Court establish beyond question that Section 265 of the Judicial Code does not bar

federal courts from staying collection of a state tax if the state proceedings have not passed from the administrative into the judicial stage. *City Bank Farmers Trust Co.* v. *Schnader,* 291 U. S. 24 (1934); *Hill* v. *Martin, State Tax Commissioner,* and *Dorrance* v. *Martin, State Tax Commissioner,* Nos. 193 and 194 of this Term, decided December 16, 1935, United States Law Week of December 17, 1935, page 26.

That portion of Section 266 of the Judicial Code, dealing with abatement of the action in the Federal Court "obviously refers to those cases where no temporary restraining order has been issued, and where, before final hearing on the application for the interlocutory injunction, a suit has been brought in the state court to enforce the statute or order complained of, accompanied by a stay of all proceedings under such statute or order."

> *Union Light Heat & Power Co.* v. *R. R. Com.,* 17 F. (2d) 143, 147 (1926).

Moreover, as said by this court in *Dawson* v. *Kentucky Distilleries,* supra at p. 297:

> "The stay contemplated by Congress is a general one, which would protect, among others, those who had already sought protection in the Federal Court."

No suit was instituted in the state court to enforce the provisions of Act 23 of 1934. Nor was there any attempt, before the final hearing of the application for an interlocutory injunction, to obtain the permission of the Federal Court to bring such a suit. Nor did appellant offer, at any time, to accompany such suit with a stay of any nature, much less one that would protect the appellees against either civil or criminal proceedings. On the contrary, appellant entered into a stipulation that the restraining order should "remain in full force and effect, without the necessity of entry of any formal order renewing same, until the hearing

by the statutory court of three judges of the application of plaintiffs for a preliminary injunction." (R. 15). The hearing on the application for a preliminary injunction was fixed for November 23, 1934, and was had on that day. (R. 15). Appellant filed no pleading until the case was called for hearing on November 23, 1934, at which time appellant filed a motion to dismiss, to strike, and an answer, in one document. It was not until then that appellant raised any question as to the provisions of Section 266 of the Judicial Code.

Appellant is now precluded from raising this question. This appeal is not from the order granting the preliminary injunction but is an appeal from the final decree. No appeal was ever taken by appellant from the preliminary injunction. On the contrary, appellant agreed that the case should be submitted for the final decision on the same record as was made up on the hearing for the preliminary injunction. Appellant cannot now raise any question as to whether either the restraining order or the preliminary injunction should have been granted.

II.

Discrimination

(A) Act 23 of 1934 Violates the Provisions of Section 8 of Article X of the Constitution of Louisiana of 1921, Which Requires that License Taxes Must be Levied on All Persons Engaged in the Trade, Business, Occupation, Vocation or Profession Upon Which a License Tax is Imposed and Must be Based Upon the Gross Receipts from Such Trade, Business, Etc.

Act 23 of 1934 is unquestionably a license tax act. The title recites that it is "to provide additional revenue for the State of Louisiana by levying a license tax." Section 1, which is the section levying the tax, provides that the persons and concerns theretofore enumerated shall "pay a license tax for the privilege

of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business."

It has been established that this law is applicable to no publication except the thirteen newspapers of appellees and that the other one hundred and fifty publications published in Louisiana are exempted from the operations of said act by virtue of its provision that it shall apply only to publications "having a circulation of more than 20,000 copies per week."

Section 8 of Article X of the Constitution of Louisiana of 1921 provides:

> "License taxes may be levied on such classes of persons, associations of persons and corporations, pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except clerks, laborers, ministers of religion, school teachers, graduated trained nurses, those engaged in mechanical, agricultural or horticultural pursuits, or in operating sawmills. Such license taxes may be classified, graduated or progressive."

The Constitutions of 1879, 1898 and 1913 contain substantially identical provisions (Article 206 of the Constitution of 1879; Article 229 of the Constitution of 1913), except that the previous constitutions required that the amount of such tax must be graduated and did not contain the provision in the concluding sentence of the Article of the Constitution of 1921 that "such license taxes may be classified, graduated or progressive."

State v. *Banner Cleaners and Dyers*, 170 La. 76, 127 So. 370 (1930).

The Supreme Court of Louisiana has uniformly held under all of the Constitutions from 1879 to the present day that a license tax was invalid unless it bore upon every person engaged in the business, occupation or profession sought to be affected and that this doctrine applied even though the Legislature, through mere in-

advertence, had failed to provide for a license tax on business whose receipts were between certain figures. Thus, in the case of *State* v. *Southern States Alcohol Co.*, 137 La. 72, 68 So. 217 (1915), the court held that the inadvertent failure to impose a license tax on those whose receipts were between $100,000.00 and $150,000.00, while imposing such a tax on those in the same line of business whose receipts fell either above or below these figures, violated the provisions of the Constitution of 1898. The court said:

> "If a part of the thing to be graded is left out, if some of the persons, firms or corporations to be classified are left out, there is not a complete gradation or classification, but only a partial one (in other words there is not a gradation or classification but only the commencement, or attempt at one), and, needless to say, this last is not what Article 229 of the Constitution contemplates when it requires a gradation or classification; but what it contemplates and requires is a gradation or classification that is complete, that embraces all the persons, firms or corporations subjected to the license, or, which is the same thing, who must be subjected to it if discrimination and consequent unconstitutionality is to be avoided."

In the recent decision of *State* v. *Banner Cleaners & Dyers, supra,* the Supreme Court of Louisiana made a like ruling under the Constitution of 1921 as to an act which inadvertently failed to provide for a license when the gross annual receipts were more than $5,000.00 and less than $6,000.00. The court reiterated its language in the *Southern States case, supra,* and expressly held that the Constitution of 1921 made no change in the law in this respect.

(B) Act 23 of 1934 Violates the Provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States, in That it Denies Appellees the Equal Protection of the Laws.

Act 23 of 1934 arbitrarily discriminates against Appellees in the following respects:

(1) It imposes a tax on advertising appearing in newspapers and other publications and in moving pictures, and exempts from such taxation advertising by means of other media, to-wit: Radio broadcast advertising, outdoor advertising, and street car card advertising;

(2) It imposes a tax on advertising appearing in the thirteen newspapers published by plaintiffs, and exempts from taxation advertising appearing in all of the other one hundred and fifty newspapers and other publications in Louisiana which sell and publish advertising.

Considered in essence as a tax on advertising, the tax is clearly discriminatory, because it is imposed on the two largest advertising media, newspapers and magazines, and on the smallest medium, moving pictures, and is not imposed on the other three media of advertising which, as to volume and importance, lie between the media upon which the tax is imposed.

Considered separately as applying to newspapers and other publications, there is no logical or reasonable basis for taxing newspapers and other publications having a circulation of more than twenty-thousand per week and exempting all others.

In the first place, the uncontradicted evidence shows (R. 51, 52) that volume of circulation is only one of several factors affecting the rate and volume of advertising and the consequent revenue derived therefrom. Even if the theory were sound that mere size of business would justify a difference in classification, volume of circulation could not be a proper basis for classification as to a tax on advertising in newspapers. Circula-

tion has no fixed relation to volume of advertising or advertising revenue, and a classification based thereon is inherently arbitrary.

In the second place, the mere size of a business affords no basis for taxing less than ten per cent of the concerns engaged therein and exempting all others. The newspapers published by plaintiffs are engaged in identically the same business as are those newspapers which are exempted from the operation of the statute.

As said by this Court in *Cotting* v. *Godard*, 183 U. S. 79 (1901):

> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences of of the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

The Act in question is clearly in conflict with the settled jurisprudence of this Court that a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Louisville Gas Co. v. *Coleman*, 277 U. S. 32 (1928);
Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 389 (1928);
Stewart Dry Goods Co. v. *Lewis*, 294 U. S. 550 (1935).

Appellant seeks to justify the separate classification of newspapers having a circulation of more than 20,000 copies per week on the ground that this operates as a classification between the small country journal and the huge city newspaper and that the respective business of

the two are entirely different. The record does not support any such contention. On the contrary, the affidavits filed by the appellant fail to show that there is any substantial difference between them except as to size of business and as to the volume of national advertising appearing therein. There is not even a suggestion that the country newspapers do not still continue to carry a substantial volume of local advertising.

Moreover, the record shows that there are four daily newspapers exempted from the operation of the statute; that these newspapers conduct business identical to that of these appellees who are subjected to the statute; and that these exempted daily newspapers are in direct competition with appellees' daily newspapers.

We deem it unnecessary to discuss any of the decisions of this Court cited by appellant on this point, except to point out that in each of these cases where the statute was upheld the basis of the decision was that the business exempted from the operation of the statute was substantially different from that subjected to the operation of the statute, and hence that there was a reasonable, and not an arbitrary, basis for the classification. For example, in the case of *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322, 332 (1913), this Court said:

> "It has a reasonable basis, resting on a real distinction. It is not a distinction based on mere size only, as contended by appellant, nor upon the mere amount of business done."

III.

Abridgement of the Freedom of the Press

(A) The Constitutional Guaranties Against Abridgement of the Freedom of the Press Were Intended to Prohibit Every Form of Abridgement Conceivable in the Minds of Hostile Legislatures.

A fundamental issue in this case is whether the Legislature of Louisiana has the power to levy a gross re-

ceipts tax on the advertising portion only of the business of the press, which in effect is a tax upon the press itself, and to make such a tax a condition precedent to a license to do business in the State of Louisiana.

These appellees contend that the Legislature has no such power. Both the Constitution of the United States and the Constitution of the State of Louisiana prohibit the abridgement of the freedom of the press in any such manner. No conclusion can be drawn from a perusal of the record in this case other than that Act 23 of the Legislature of Louisiana for 1934 constitutes an abridgement of the freedom of the press in violation of both the Federal and State Constitutions. The Act provides for a licensing of the press and a payment of a gross receipts tax on that portion of the revenues of the press derived from the sale and publication of advertising. Further, the Act is limited in its applicability to but thirteen newspapers out of a total of 163 in the State of Louisiana (R. 50), of which thirteen newspapers twelve were active in their opposition to the dominant political group in the State, which group controlled the Legislature and at whose dictates the Legislature passed this law. (R. 43.)

The punitive purpose of this statute can be no better illustrated than by what Senator Long and Governor Allen said in the circular which they distributed in the Legislature at the time Act 23 was under consideration:

> "It is a system that these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, two cents per lie." (R. 43.)

Senator Long confirmed the purpose of the Act in his speech at Sulphur, Louisiana, on or about September 24, 1934, when he said:

> "There was only one newspaper in the State that had not joined up with the gang opposing me and that was the 'Lake Charles American-Press.' Well, we tried to find a way to exempt the 'Lake Charles Amer-

ican-Press' from the advertising tax, but did not think we could do it, but we would have done it if we could." (R. 43.)

The American-Press joined as a plaintiff below.

The framers of the Constitution of the United States were familiar with every conceivable effort to restrain the press. In the appendix to this brief there will be found a brief resumé of the history of the struggle for a free press and it is respectfully requested that the same be considered and read as a part hereof.

Among the efforts to restrain the press with which the framers of the Constitution were familiar were licensing, censorship, taxation, writs of attachment, seditious libel and injunction proceedings. Taxation as a form of restraint was well known and particularly obnoxious to our forefathers.

The historical background of the First Amendment was fully discussed by this Court in its decision in *Near* v. *Minnesota*, supra. That case dealt with an attempt by a legislature to suppress newspapers by injunction and this Court held that a legislature was without such power.

The real issue there, as here, was over the attempt by the legislature to exercise a power prohibited by the Constitution.

Not only the First Amendment to the Constitution of the United States but the Fourth and Fifth Amendments grew out of the knowledge of our Constitution makers of efforts to control the press, which, if successful, would make it easy for dictators to control their subjects.

In the case of *Boyd* v. *United States*, 116 U. S. 616 (1886), this Court discussed the history of the Fourth and Fifth Amendments to the Constitution, and in its discussion referred to the celebrated Wilkes and Entick cases which arose in England just prior to the American Revolution.

It is inconceivable that when the framers of the Constitution adopted the broad language included in the First Amendment thereof that there was any doubt in their

mind as to its being all-inclusive or that they had any mental reservations. As this Court said of the Fourth and Fifth Amendments in the Boyd case supra:

> "The struggles against arbitrary power, in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to allow them to approve of such insidious disguises of the old grievances which they had so deeply abhorred."

At the time the Constitution was adopted, the press of England was subject to taxation. The taxes were known as the taxes on knowledge and they were not repealed in England until many years after the adoption of our Constitution.

Two distinguished writers have stated that the American Revolution really began in 1765 when the British Government sent the stamps for newspaper duty to the American Colonies. (American Debates by Marion Mills Miller, Vol. 1, p. 20, John Lennox and the Taxes on Knowledge by William Stewart, p. 8.)

At the outbreak of the war for independence and at the time of the adoption of the Constitution, there were stamp taxes on circulation of and taxes on advertising printed in English newspapers. The circulation tax became effective in 1712 and it was not repealed until 1855. The advertising tax became effective in 1712 and was abolished in 1853. (James Paterson, The Liberty of the Press,—London, 1880, pp. 56-58.)

During the debates on the ratification of the Constitution, one of the burning issues before the public was the failure of the constitutional convention to include in the body of the document a so-called bill of rights including a guaranty of a free press, and the Constitution itself was not adopted until the framers thereof had pledged themselves to submit such a bill of rights with a free press guaranty to the first session of congress convening after ratification. Richard Henry Lee, Eleazer Oswald, Melancthon Smith, and other patriots in the debates over ratifica-

tion specifically assailed the Convention for failing to include a free press provision which would prohibit suppression of the press by taxation. (See Appendix B hereof.)

The very First Amendment of the Constitution included in that bill of rights contains the provision prohibiting congress from abridging the freedom of the press or free speech. For many years, this provision was regarded solely as a prohibition against congressional action, but with the ratification of the Fourteenth Amendment of the Constitution it was held to be a prohibition against action by the State Legislatures as well. *Near* v. *Minnesota, supra; Gitlow* v. *New York, supra; Whitney* v. *California, supra.*

Therefore, it must be concluded, that the framers of the Bill of Rights had no mental reservations when they drafted the First Amendment. That amendment was written to protect the people in their right to have a press free from restraint from whatsoever hostile source the threat of restraint might spring, and from any method sought to be applied,—whether that method be censorship, licensing, taxation, seditious libel, injunction, writ of attachment or anything else.

(B) The Power to Tax the Press is the Power to Destroy It—Such Power Cannot Be Exercised By a Legislature In Violation of the Constitutional Prohibitions.

This record shows that the function of the newspaper press is the gathering and dissemination of information in the form of news, editorial comment and advertising (R. 54, 56).

The record further shows that newspapers have but two principal sources of revenue,—from the sale of their publications, known as circulation revenue, and from the sale of advertising, known as advertising revenue (R. 51). There is no fixed relation between the two (R. 51). Both constitute the lifeblood of a newspaper and anything which depletes the revenues of a newspaper

from either source, impairs the ability of that paper to serve its function.

The principle that the power to tax is the power to destroy has been imbedded in our jurisprudence since the decision of this Court in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819).

Where the power to tax exists, there is no limit on the legislature's discretion as to the amount of the tax. If it has the right to tax at all, it has the right, if it so desires, to tax the particular business right out of existence. *A. Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934).

The oppressiveness of the burden cannot interdict the tax. *Stewart Drygoods Company* v. *Lewis, supra.*

These appellees are not discussing the burden of this particular tax. Rather, they assert that the Legislature does not have the power to levy a tax on their business such as it has levied. If it can tax the revenues which they receive from the printing and publishing of advertising, the Legislature can tax the revenues which they receive from circulation,—the distribution of their newspapers to their readers.

If the Legislature can tax advertising, when published in a newspaper, it can tax news, or it can tax editorial comment as and when they are published.

If the Legislature can tax advertising receipts two per cent, as it did in this case, it can tax advertising right out of existence. In fact, the record shows that one of the purposes of this tax as alleged at the hearing in the District Court, was to divert business from newspapers having a circulation of more than 20,000 per week to newspapers with less than 20,000 per week. (R. 70, 71, 74, 75, 77, 80, 82, 84, 88.)

This purpose to divert business from newspapers having a circulation of more than 20,000 per week to newspapers with a circulation of less than 20,000 per week has also been advanced by appellant in its brief before this Court, and it must be considered as an admission of an intent by the Legislature to interfere with the business of

a particular group of newspapers and to regulate that business through the device of taxation. (Appellant's Brief, Parts VI and VII.)

Appellant argued in the court below and has argued in its brief here that the First Amendment to the Constitution does not prohibit the State of Louisiana from abridging the freedom of the press through action by its Legislature. The contrary was squarely decided by this Court in *Near* v. *Minnesota, supra.*

The record is replete with evidence (R. 54, 56) that newspapers are dependent for their existence upon the revenues which they receive from advertising and circulation and that they cannot exist if either source is impaired or destroyed.

This Court has the power to inquire into the substance of this tax. It should not be confused by the shadow. *Stewart Dry goods Company* v. *Lewis, supra.*

The levy is nothing more nor less than a direct tax upon the newspaper publishing business. Its effect is immediate, direct and punitive,—not remote, indirect or harmless.

In *Brown* v. *Maryland,* 12 Wheat. 419 (1827), a tax on the occupation of an importer was held a tax on imports obnoxious to the Commerce clause.

"All must perceive," said the Court, "that a tax on the sale of an article, imported only for sale, is a tax on the article itself."

In the present case, this finding might be applied to read:

> "All must perceive that a tax on advertising printed in a newspaper is a tax on the newspaper itself."

In *Cook* v. *Pennsylvania,* 97 U. S. 566 (1878), the equivalent of this very fact was found by this Court, when it held that a tax on the amount of an auctioneer's sales was a tax on the goods themselves.

In this connection, the Supreme Court of Missouri has

had occasion to pass upon an enactment making it an offense for a civic league to publish the results of investigations into the fitness of candidates for public office under certain circumstances. In holding the statute to be offensive to the freedom of the press clause of the Missouri constitution, the court said:

> "Anything which makes the exercise of a right more *expensive* or less convenient, more difficult or less effective, impairs that right." (Emphasis supplied.)
>
> Ex parte Harrison, 212 Mo. 88, 110 S. W. 709, 16 L.R.A. (N.S.) 950, 126 Am. St. Rep. 557, 15 Ann. Cas. 1 (1908).

An application of this test to the Louisiana newspaper tax statute must inevitably result in a declaration of its invalidity on the same ground.

A tax on the principal source of revenue of a newspaper is a tax upon its subsistence. As said by Mr. Justice Holmes:

> "A power over a man's subsistence amounts to a power over his will." *Evans* v. *Gore,* 253 U. S. 245 (1920).

A legislature which has the power to levy a direct tax upon the press has the power not only to control it but to destroy it.

In the argument in the District Court appellant contended the Legislature has such power. She has renewed that contention here.

The Louisiana Legislature has no such power, and it is respectfully submitted this Court should so find.

(C) The Power to License the Press is the Power to Reguate It, or to Destroy It. Such Power Abridges the Constitutional Guaranties of a Free Press.

The mere thought of a licensed press is repugnant to our concept of the exercise of the functions of govern-

ment. Yet Section 1 of the Louisiana Act in controversy provides

> "that every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week . . . shall . . . pay a license tax for the privilege of engaging in such business in this State of two percent. (2%) of the gross receipts of such business."

Any attempt to license the press, whatever the nature or terms of the license may be, constitutes an abridgement of the right to have a free press.

(D) The Attempt by the Legislature to Levy a Tax Solely by Reference to the Volume of Circulation Abridges the Freedom of the Press.

It would seem this point needs no elaboration. The constitutional guaranty contains no reference to the size of a newspaper or the volume of business done by the press. It states that no law shall be passed abridging the freedom of the press. An attempt to tax the press over a certain size is a direct violation of this provision.

The record shows that circulation is but one of many factors affecting advertising. (R. 51, 52.) The volume of a newspaper's circulation certainly has but a remote bearing on its revenues from advertising, if any at all. (R. 51, 52.)

This is well illustrated in the footnote below giving various examples of two newspapers in each of several fields with their comparative circulations, advertising rates and advertising lineage for the year 1933.* R. 52.

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* Examples of circulation, advertising rates and advertising lineage:

	Circulation	Rate	Advertising Lineage for 1933
NEW YORK CITY			
"Herald Tribune"	317,697	72c	6,616,209
"American"	337,238	65c	6,426,347
WASHINGTON, D. C.			
"News"	67,083	18c	3,908,102
"Herald"	94,250	15c	3,502,775
MIAMI, FLORIDA			
"News"	22,200	11c	405,000
"Herald"	37,650	11c	557,714
DALLAS, TEXAS			
"Journal"	40,552	12c	4,771,227
"Dispatch"	40,674	10c	2,845,605
BALTIMORE, MD.			
"Sunday Sun"	177,283	50c	4,078,142
"Sunday American"	198,645	35c	2,979,280
BOSTON, MASS.			
"Transcript"	33,605	25c	3,697,022
"Post"	346,607	60c	5,485,109
DETROIT, MICHIGAN			
"Sunday News"	268,972	55c	3,037,032
"Sunday Times"	285,166	50c	2,635,545

Even were the law so phrased as to levy the tax by reference to the volume of advertising instead of the volume of circulation it would be invalid. As this Court has said:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions is manifest and substantial, . . . A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, *or to so diminish the profit as to impede or discourage the conduct of commerce.*" (Italics supplied.) *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321 (1918).

As heretofore pointed out, appellant argued in the court below and has reiterated the contention here that one of the purposes of Act 23 was to discourage advertisers from

using newspapers having a circulation in excess of 20,000 per week and to encourage them in the use of the smaller newspapers. The rate of 2% was applied for this purpose. If that rate were insufficient to effect it, then a higher rate naturally would be enacted.

If the Legislature has the power to enact any rate for such a purpose,—the purpose being to impede and discourage the conduct of the business of papers having a circulation in excess of 20,000 per week,—then it has the power to enact whatsoever rate it finds necessary to accomplish that purpose.

A classification of newspapers by reference to the volume of circulation for tax purposes abridges the freedom of the press. The fact that appellant admits the purpose is to impede and discourage the business of newspapers having a circulation in excess of 20,000 per week serves to emphasize the restrictive effect of any tax levied upon the business itself.

(E) The Fact That These Appellees are Corporations Does Not Deprive Them of the Right to Resist an Attempt to Abridge the Freedom of the Press.

In the District Court, appellant argued that the First and Fourteenth Amendments, considered together, were for the benefit of natural persons and that corporations (artificial persons) could not avail themselves of rights thereunder to protect themselves against hostile action by a legislature, even though their business was printing and publishing newspapers, and such action would abridge the freedom of the press.

Appellant attempts to distinguish between persons and corporations in the application of the Fourteenth Amendment to the sacred fundamental rights guaranteed under the Bill of Rights. This Court, many years ago, held "that corporations are persons within the meaning of this (the Fourteenth) Amendment." *Home Insurance Com-*

pany of New York v. *The People of the State of New York,* 134 U. S. 594 (1890).

Reference to Act 23 shows that the Legislature made no attempt whatsoever in that statute to distinguish between natural and artificial persons. The Act applies to "every person, firm, association, or corporation, domestic or foreign, engaged in the business" in the State of Louisiana.

The corporate form of doing business was known at the time the First Amendment was ratified. It was known at the time the Constitution of Louisiana was adopted in 1921.

Newspaper publishers, whether natural or artificial persons, were not given this great right as a matter of personal right to the exclusion of others. Rather, they occupy the position of trustees of a right granted to all of the people. By reason of their peculiar position, it is their solemn duty to protect the press, at all hazards, against hostile action. They and only they can do so. *Massachusetts* v. *Mellon,* 262 U. S. 447 (1923).

This issue has been determined by this Court in *Pierce* v. *Society of Sisters, supra.*

IV.

This Court Has the Power to Ascertain the Nature and Effect of This Act, Irrespective of its Designation or Declared Purpose.

The declared purpose of Act 23 of 1934 is the raising of revenue for the State of Louisiana.

A further purpose alleged by the appellant herein at the hearing in the District Court was the diversion of advertising from the larger to the smaller newspapers of the State. (R. 76.)

The real and underlying purpose of the legislation, however, is to punish those newspapers opposed to the dominant political faction in the State (R. 43), and

serve notice on them of further reprisals in the event of continued opposition.

Courts universally determine the validity of legislation according to its real rather than according to its declared purpose, as the latter may be disclosed by wholly superficial language. It is settled that where the validity of an Act is questioned courts will brush aside pretense, subterfuge and chicanery and look through the form to the substance. They are not bound by recitals, but reach their judgment from an examination of the actual operation and effect of a statute. The result must be taken into consideration. *Near* v. *Minnesota, supra; Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20 (1922).

Now what is the effect of this law?

As heretofore pointed out, it levies a two percent gross advertising tax on newspapers and periodicals having a circulation of more than 20,000 per week. Only 13 out of 163 newspapers in the State of Louisiana are affected by it. The entire group is represented by these appellees. Twelve of the thirteen were opposed to the dominant political faction responsible for the legislation. Both before and after the law was passed its punitive purpose was proclaimed by its sponsor. (R. 43.)

There are four newspapers in Louisiana with circulations barely under 20,000 per week. (R. 49.) These compete with newspapers in the proscribed class. There are 120 weekly newspapers in the State, none of which is affected by the law. (R. 50.) The only newspapers affected are daily newspapers. (R. 50.) Yet the classification is based on weekly circulation. Circulation has no fixed relation to advertising revenues. (R. 51, 52.)

There can be no conclusion other than that the real purpose and effect of this law is a punishment of the press opposed to the dominant political faction in the state.

Conclusion

It is respectfully submitted, on the basis of the authorities cited, and the reasoning herein contained, that the District Court, as a federal court and as a court of equity, had jurisdiction of this cause as to all of the plaintiffs; that the case presented called for the exercise of jurisdiction by a court of equity; and that Louisiana Act 23 of 1934 is unconstitutional in that it violates the license tax requirements of the State Constitution, the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution, and the guarantee of a free press contained in both Constitutions.

Respectfully submitted,

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APPENDIX A

Statutes Involved

Act 23 at the Regular Session of the Louisiana Legislature (1934)

To provide additional revenue for the State of Louisiana by levying a license tax, in addition to all other licenses and taxes now levied and assessed in this State, upon every person, firm or corporation engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than twenty thousand copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures; to require reports of such business, in aid of the collection of such license tax, and to provide for such collection and for the adoption of regulations relative thereto; to fix penalties for violations of this Act or of any of said regulations; and to provide for the disposition of the proceeds of such license tax.

Section 1. Be it enacted by the Legislature of Louisiana, That every person, firm, association or corporation, domestic or foreign, engaged in the business of selling, or making any charge for, advertising or for advertisements, whether printed or published, or to be printed or published, in any newspaper, magazine, periodical or publication whatever having a circulation of more than 20,000 copies per week, or displayed and exhibited, or to be displayed and exhibited, by means of moving pictures, in the State of Louisiana, shall, in addition to all other taxes and licenses levied and assessed in this State, pay a license tax for the privilege of engaging in such business in this State of two per cent. (2%) of the gross receipts of such business.

Section 2. That on the 1st day of October, 1934, for the period August 1, 1934, to September 30, 1934, inclu-

sive, and thereafter, on each first day of January, April, July and October, for the preceding quarter of the year, every person, firm, association or corporation, domestic or foreign, engaged in such business, or who has transacted any such business, shall file with the Supervisor of Public Accounts a sworn report showing the amount of gross receipts for such business during the period covered by said report.

Section 3. The Supervisor of Public Accounts shall have authority to require reports sworn to cover any transaction during the same period, similar to those provided for in Section 2, of any person, firm, association or corporation who has paid for such advertising service.

Section 4. Every such person, firm, association or corporation who is required to submit a report, as provided in Section 2, shall accompany such report by a remittance to the Supervisor of Public Accounts, in lawful money of the United States, or by certified check, or by any other means as may be authorized by said Supervisor of Public Accounts, of the amount of the tax shown to be due by said report, or two per cent. (2%) of the gross amount of any such business done during the period covered by such report. The Supervisor of Public Accounts is authorized to audit and revise any report filed under this Act, and to assess additional taxes when and as shown to be due, notice of any such additional taxes to be given by mail to the taxpayer or person owing the tax; and any such taxpayer shall have the right to contest any such assessment in the District Court of the Parish of East Baton Rouge. Provided, that the burden of proving any claim made as to any such report shall be upon the plaintiff.

Section 5. In cases where it is established to the satisfaction of the Supervisor of Public Accounts that a payment or payments have been made under this Act that were not due and collectible, the Supervisor of Public Accounts is authorized to refund such payments out of

any funds on hand, collected by virtue of this Act, and not remitted to the State Treasurer according to law.

Section 6. The Supervisor of Public Accounts is authorized to adopt, and publish in the official journal of the State, reasonable rules and regulations for the purpose of efficiently carrying out the purposes of this Act.

Section 7. All taxes levied by this Act are due on the day following the last day of the quarter year, as to the business or transactions done or had during such quarter year, and shall become delinquent on the thirtieth day following the last day of the quarter in which such business was transacted; and such delinquent taxes shall bear interest at the rate of one per cent. (1%) per month from their due date, until paid.

Section 8. In case it becomes necessary to enforce payment of any tax due under this Act, the Supervisor of Public Accounts may institute suit, in any court of competent jurisdiction, for the amount of the tax and interest, and may also include in such suit a demand for a penalty of 25% of the amount of the tax and interest, as attorney's fees, which said penalty is hereby imposed upon any taxpayer against whom it is necessary to proceed, and shall be taxed as costs and included in the judgment rendered; execution of which judgment, shall take place as provided by existing laws.

Section 9. It shall be unlawful for any person, firm, association or corporation, required to file a report or to pay a tax by this Act or by any regulation issued under authority thereof, or any managing agent or officer of any such firm, association or corporation

(1) To fail, neglect or refuse to file the aforesaid sworn report at the time and in the manner and form prescribed, or to pay any tax due under this Act prior to its becoming delinquent; and

(2) To make any false statement in said sworn report, or to make any false representations to the Supervisor of Public Accounts as to any tax levied by this Act.

And any person violating any provision of this Act shall be deemed guilty of a misdemeanor and, on conviction, shall be fined not exceeding Five Hundred Dollars ($500.00) or imprisoned not exceeding six months, or both, at the discretion of the court, for each violation.

As to corporations violating this Act, there shall be recovered, at the suit of the district attorney, an amount not exceeding Five Hundred Dollars ($500.00) for each violation.

The venue of prosecutions and suits under this Act shall be the parish where the report was made or the tax computed by the taxpayer, or the parish where the business was transacted, or payment therefor received; but as to corporations not maintaining their records in this State, all such proceedings shall be brought at the domicile of their agents for service.

Section 10. For the purpose of enforcing the collection of the tax levied by this Act, the Supervisor of Public Accounts is hereby specifically authorized and empowered to examine, at all reasonable hours, the books, records and other documents of all persons, firms, associations or corporations who have transacted any of the business described in Section 1 hereof, or who are liable for any tax under this Act, or as to the business of whom there is levied the tax provided by this Act, in order to determine and provide for a correct check and ascertainment of the true amount due. In the event that any person, firm, association or corporation, or the employee, agent or officer of said firm, association or corporation, shall refuse to permit such examination of such books, records and other documents by the Supervisor of Public Accounts, as aforesaid, said officer may proceed by rule, in chambers or in open court, in or out of term time, in any court of competent jurisdiction, in the parish where such refusal occurred, and require said person, firm, association or corporation, or employee, agent or officer of said firm, association, or corporation to show cause why

the Supervisor of Public Accounts should not be permitted to examine said books, records, or documents; and in case said rule be made absolute, the same shall be considered a judgment of the court and every violation thereof deemed a contempt of the court, to be punished according to law.

Section 11. The Supervisor of Public Accounts shall make remittance to the State Treasurer, not later than the 30th day after the last day of the preceding quarter, of all taxes, interest and penalties collected by him during the said quarter, and the Treasurer shall place the same to the credit of the Property Tax Relief Fund, to be disbursed and disposed of as provided in the Act creating such fund. Provided that the sum of Two Thousand Dollars ($2,000.00) per month of such collections may be withheld by the Supervisor of Public Accounts for the expense of enforcing this Act.

Section 12. Should the collection of State taxes be transferred by the Legislature from the Supervisor of Public Accounts to any other office, board, commission, officer, or official in whom is vested the collection of the taxes herein levied, said new collector shall have all the authority vested in the Supervisor of Public Accounts by this Act, and the title of such officer, board, commission, office or official shall be substituted for "Supervisor of Public Accounts", where the same appears in any provision of this Act.

Section 13. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of said Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

(Official Edition Acts of Louisiana for 1934—176.)

Paragraph 1 of Section 24 of the Judicial Code, as amended, provides in part as follows:

> "The District Courts (of the United States) shall have original jurisdiction:

"Of all suits of a civil nature, at common law or in equity, . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and (a) arises under the Constitution or laws of the United States . . . and then the foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraph paragraph of this Section."

Paragraph 14 of Section 24 of the Judicial Code, as amended, provides that the District Courts (of the United States) shall have original jurisdiction:

"Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

Section 266 of the Judicial Code, as amended, reads as follows:

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge and the other two may be either circuit or dis-

trict judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid . The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit

in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

Constitutional Provisions Involved

Section 8 of Article X of the Constitution of Louisiana, 1921:

> "License taxes may be levied on such classes of persons, associations of persons and corporations, pursuing any trade, business, occupation, vocation or profession, as the Legislature may deem proper, except clerks, laborers, ministers of religion, school teachers, graduated trained nurses, those engaged in mechanical, agricultural or horticultural pursuits, or in operating sawmills. Such license taxes may be classified, graduated or progressive."

Section 3 of Article I of the Constitution of Louisiana:

> "No law shall ever be passed to curtail or restrain the liberty of speech or of the press; any person may speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

Section 1 of the Fourteenth Amendment of the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The First Amendment of the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

APPENDIX B

Volumes have been written on the fight for a free press, which has been waged ever since the art of printing was invented. In a brief such as this it would be impossible to do more than make general references to these works. However, some references are essential.

Liberty without the right of free speech and the right to have a free press was inconceivable to our forefathers.

In 1787, in order to form a more perfect union and "secure the Blessings of Liberty to ourselves and our Posterity", the delegates to the Constitutional Convention submitted to the American people with a recommendation for its ratification the Constitution of the United States. In April, 1789, it was ratified, after prolonged debate and discussion, during which the sponsors of the Constitution had agreed to submit to the first session of Congress convening under the Constitution a Bill of Rights for inclusion therein. The Bill of Rights—the original ten amendments—was ratified in 1791.

The very first of these Amendments prohibits Congress from passing any law abridging freedom of speech or a free press. The debates over ratification of the Constitution, followed as they were by the ratification of the First Amendment, demonstrate that it was impossible for the overwhelming majority of the people to conceive of liberty as guaranteed by the Constitution which did not embrace the right of free speech and the right to have a free press. As Mr. Madison said, the press had exerted a freedom in canvassing the merits and measures of public men of every description not confined to the limits of the common law. *Near* v. *Minnesota, supra.*

From a time before the adoption of the Constitution, even before the war for independence, a free press has been almost universally regarded as a safeguard of our institutions.

There can be no doubt that the First Amendment of the Constitution of the United States and its counterparts in

the various state constitutions were adopted to prohibit all governmental restraints on freedom of expression, of whatever nature or description.

At the time of the revolution as at the time of the ratification of the First Amendment, newspapers suffered from three specific forms of taxation, all initiated during the reign of Queen Anne:

a) The advertisement duty;
b) The stamp tax on circulation; and
c) The tax on paper.

In addition, the English law called for bonds as "security for good behaviour" from all publishers of newspapers.

J. B. Williams, in his "History of English Journalism" (1908), deals extensively with these forms of repression and suppression.

The advertisement duty was not repealed until 1853; the stamp duty not until 1855; the paper duty not until 1861; and the act requiring security for good behaviour not until 1869,—or a year after the ratification of our Fourteenth Amendment, which secured the liberties of the Bill of Rights against hostile action by state legislatures as well as by Congress.

The following paragraphs are enlightening on this question of taxation of the press:

> "In 1712 the War of the Spanish Succession was still dragging on, and the Treasury, like Queen Anne's privy purse, was empty. These facts gave the Commons of Great Britain the idea of killing two birds with one stone: so the libels and blasphemies of the Press were to be suppressed by a tax which would at the same time keep the newspapers in hand and help in the necessary purpose of raising 'large supplies of money to carry on the present war until your Majesty be enabled to establish a good and lasting peace, and for defraying your Majesty's other extraordinary expenses.' The measure which was designed to effect these purposes is 10 Anne, cap. 19 (1712),

and it is entitled 'An Act for levying several duties upon all sope and papers made in Great Britain or imported into the same . . . and upon several kinds of stampt vellum, parchment, and paper, and upon certain printing papers, pamphlets, and advertisements; for raising the sum of eighteen thousand pounds by way of lottery,' etc.

"This Act hit the printer and publisher of a newspaper a triple blow; it imposed a duty on paper to be levied for thirty-two years (it was made perpetual five years later); it placed another duty, to be collected by means of stamps, upon pamphlets, and upon 'all newspapers or papers containing public news, intelligence, or occurrences,' printed in Great Britain to be dispersed and made public; and it laid a charge by way of duty upon every advertisement to be contained in the *London Gazette* or any other printed paper, such paper being dispersed or made public weekly or oftener. Addison, in the *Spectator* of 31st July, 1712, the day before the Act came into operation, was oppressed by dismal forebodings. Swift, both before the passing of the Act and after a year's experience of its operation, was decidedly hostile.

"Through the century following its enactment, printers sought constantly to evade the working of this measure, whose structure was changed from time to time, in order to meet evasions and to tighten still more closely the bonds in which the authorities held the pestiferous Press. One way in which this object was sought was by the revision of the definition of a newspaper. The original definition of the Act of Anne was amended by 60 George III. (1820), cap. 9, to read: 'Pamphlets or papers containing public news, intelligence, or occurrences, *or any remarks or observations thereon, or upon any matter in Church or State.*' Finally, by 6 and 7 William IV. (1836), the duty was imposed upon every paper printed in Great Britain weekly or oftener, or at intervals not exceeding 26 days, containing only or principally advertisements, and containing any public news, intelligence, or occurrences. Such details as the area of the printed matter were taken into consideration in fixing the rate of duty, which was as high as 4½d. per

copy at one time, while the advertisement duty for long stood at the almost prohibitive figure of 3s. 6d. for each advertisement. But the most galling restriction of all was that imposed by section 89 of the Act of 1820, enacting that no person should 'print or publish for sale any newspaper or any pamphlet or other paper containing any public news . . . which shall not exceed two sheets, or which shall be published for sale at a less price than sixpence until he shall have entered into a recognisance . . . himself in £300 if the paper be published in or within twenty miles of London, and £200 if published elsewhere in the United Kingdom, with two sureties in a like sum . . . to meet the fine,' or penalty in case the publisher should be convicted of printing or publishing 'any blasphemous or seditious libel,'—that being recognized as the main occupation of news-mongers in those days. This came to be described by the reformers as the burden of Security.

"These were the onerous burdens and some of the oppressive circumscriptions under which the Press in Great Britain laboured. . ." (Stewart, William-John Lennox and the Taxes on Knowledge, Glasgow, 1918.)

A TAX ON ADVERTISING WAS ONE OF THE SPECIFIC EVILS SOUGHT TO BE BARRED FOREVER BY THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION

Erskine May in his *"Constitutional History of England"* (Vol. II, pp. 239 et seq.), traces the development of censorship from its origin with the establishment of the first printing press in England in 1476, through the Licensing Acts and Star Chamber proceedings in the reigns of Elizabeth, the Stuarts, Anne and George III, and the French and American Revolutions, until the final vindication of the principle of absolute freedom of expression, from both executive and legislative restraints, in the reign of Queen Victoria.

With particular reference to restraints on the freedom of the press by taxation, May wrote:

"So strong was the feeling against the press, that proposals were even made for reviving the Licensing

> Act. It was too late to resort to such a policy: but a new restraint was devised in the form of a stamp duty on newspapers and *advertisements*—avowedly for the purpose of repressing libels. This policy, being found effectual in limiting the circulation of cheap papers, was improved upon in the two following reigns . . . ."

May then tells the history of the oppressive libel laws which followed the abolition of the licensing acts in 1694; of the birth of the pernicious doctrine that "the greater the truth, the greater the libel"; the famous trials of John Wilkes, of Cobbett and of others for their "libels on government"; and, finally, when the "temper of the people" would bear no longer "a harsh execution of the libel laws," of the dawn of a new day for liberty of the press:

> "Nothing was now wanting to its full expansion, but a revision of the fiscal laws, by which its utmost development was restrained. These were the stamp, *advertisement,* and paper duties. It was not until after a struggle of thirty years, that all these duties were repealed: but in order to complete our survey of the press, their history may, at once, be briefly told.
>
> "The newspaper stamps of Queen Anne (10 Anne, Ch. 19, Secs. 101, 118) had risen, by successive additions, to fourpence. *Originating in jealousy of the press,* its extension was due partly to the same policy, and partly to the exigencies of finance. So high a tax, while it discouraged cheap newspapers, was naturally liable to evasion. Tracts, and other unstamped papers containing news and comments upon public affairs, were widely circulated among the poor; and it was to restrain this practice, that the stamp laws had been extended to that class of papers by one of the Six Acts. They were denounced as seditious and blasphemous, and were to be extinguished. But the passion for news and political discussion was not to be repressed; and unstamped publications were more rife than ever. Such papers occupied the same place in the periodical press, as tracts printed, at a former period, in evasion of the licenser. All con-

cerned in such papers were violating the law, and braving its terrors: the goal was ever before their eyes. This was no honourable calling; and none but the meanest would engage in it. Hence the poor, who most needed wholesome instruction, received the very worst, from a contraband press. During the Reform agitation, a new class of publishers, of higher character and purpose, set up unstamped newspapers for the working classes, and defied the government in the spirit of Prynne and Lilburne. Their sentiments, already democratic, were further embittered by their hard wrestling with the law. They suffered imprisonment, but their papers continued in large circulation; they were fined, but their fines were paid by subscription. Prosecutions against publishers and vendors of such papers were becoming a serious aggravation of the criminal law. Prisons were filled with offenders; and the state was again at war with the press, in a new form.

"If the law could not overcome the unstamped press, it was clear that the law itself must give way. Mr. Bulwer-Lytton and Mr. Hume exposed the growing evils of the newspaper stamp; ministers were too painfully sensible of its embarrassments; and in 1836, it was reduced to one penny, and the unstamped press was put down. At the same time, a portion of the paper duty was remitted. Already, in 1833, the *advertisement duty* had been reduced; and newspapers now laboured under a lighter weight.

"Meanwhile, efforts had been made to provide an antidote for the poison circulated in the lowest of the unstamped papers, by a cheap and popular literature without news: but the progress of this beneficent work disclosed the pressure of the paper duty upon all cheap publications, the cost of which was to be repaid by extensive circulation. Cheapness and expansion were evidently becoming the characteristics of the periodical press; *to which every tax, however light, was an impediment.* Hence, a new movement for the repeal of all 'taxes on knowledge,' led by Mr. Milner-Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of the newspaper stamp was relinquished." (Emphasis supplied.)

The first tax on advertising was levied by the statute of Anne. (10 Anne, C. 19, Secs. 101, 119). As will be noted from the discussion by *May, supra,* and from the historical data contained in the following pages, this tax was considered, even then, as a restraint on the liberty of the press. This is particularly interesting because the statute levied taxes, in addition to those on newspapers and advertising, on various commodities. The effect of such a tax, as an abridgment of the freedom of the press, was not considered as having been altered by coupling it with taxes on others than newspaper publishers.

One of the later English newspaper tax statutes—for there were several over the period from 1712 to 1861—expressly declared that its purpose was to restrain the press. The Act (60 Geo. III, c. 9) was called the "Publications Act or Act to Subject Certain Publications to the Duties upon Newspapers and to make Other Regulations for Restraining the Abuses arising from the Publication of Blasphemous Seditious Libels". In its preamble, the Act declared that:

> "Pamphlets and printed papers containing observations upon public events and occurrences, tending to excite hatred and contempt of the Government and constitutions of these realms as by law established, and also vilifying our holy religion, have lately been published in great numbers and at very small prices: and it is expedient that the same should be restrained."

And with this preamble, the statute went on to effect the restraint through the simple device of a tax! See *Wickwar, "The Struggle for the Freedom of the Press"*, London, 1928, p. 118; *Collet, "History of the Taxes on Knowledge"*, London, 1899, p. 17.

Collet tells of the formation of societies "For the Repeal of Taxes on Intelligence"; he quotes from the speeches in Parliament of Bulwer-Lytton, of Milner-Gibson, of Gladstone and of others, pointing to the freedom of the American Press; of the unrelenting battle waged

on many fronts from 1830 to 1861 for discontinuance of the stamp and advertisement duties; and of the universal joy of the people in the final achievement of freedom of the press in England, when these taxes were at last abolished.

All writers on the subject give the date of the repeal of the English newspaper taxes, as the date on which liberty of the press in England had its birth. This history of infringement of British freedom of the press cannot, however, be appreciated fully without a reading of *Collet Dobson Collet's "History of the Taxes on Knowledge—Their Origin and Repeal"*, published in two volumes in London in 1899. It tells the story of the "Taxes on Knowledge" —and the name by which they were known is the most telling evidence of their effect—as an interesting narrative whose reader cannot help but reach the conclusion that any tax on the press is necessarily an abridgment of its freedom.

Another English writer on the subject, sums up the story in a paragraph:

> "Though the doctrine as to a license of the Crown being necessary in order to publish a newspaper was never thoroughly settled, and soon was abandoned, there were other exceptional laws from time to time passed with respect to these periodicals . . . One of the first definite restrictions put upon newspapers was the Stamp Act of 10 Anne, c. 19, in 1711 (1712). The duty was increased in 1820, and so continued till 1855, when it was abolished . . . An advertisement duty was also imposed in 1711 (1712), and repealed in 1853 . . . All the restrictions on the publishing of newspapers caused by stamp duties, advertisement duties (etc.) being thus swept away . . . There is no court or functionary which has any power whatever to suppress, with or without reason, any newspaper . . ."
>
> *James Paterson, The Liberty of the Press,* London, 1880, pp. 56-58.

Debates in Parliament

Perhaps the most intelligent concept of the purpose and effect of the British newspaper taxes can be gleaned from the debates in Parliament at the time of their repeal. It must be borne in mind that the successful agitation in the United States for inclusion of a freedom-of-the-press clause in the Federal Constitution, was based almost exclusively on the fear that the press of America would be subjected, in the absence of such a clause, to restraint through taxation, as was then the case in England. The following excerpts are taken from Hansard's "Parliamentary Debates", where some of the speeches are given in condensed form and in the third person.

The background of the "taxes on knowledge" was given quite simply and succinctly by *Mr. Milner-Gibson,* who led the movement for their repeal, in a speech in the House of Commons on June 21, 1858:

> "The paper duty arose in the time of Anne, just after newspapers began to be party organs, to reflect on the Ministers of that time and to defend the party leaders who were then occupying the attention of the country. Mr. Hallam said, that the vivacity of the press attracted the attention of the Ministers of that day. A message was brought down, which was now upon the journals of the House, informing the House that the press was too free, that it reflected with too much freedom upon the Ministers of the day and upon the institutions of the country, and calling upon the House to take some steps to put down that great evil. The House in reply to his message, said that they would endeavour to find out a remedy adequate to the mischief. And what was the remedy? Why in a Committee of Ways and Means it was for the first time suggested that heavy taxation upon the press might have all the effect which a censorship or actual licensing of the press had in other countries, and for the first time taxes on knowledge were invented in a Committee of Ways and Means for the express and avowed purpose of restraining cheap periodicals in

this country. The newspaper stamp was one tax and the advertisement duty another."

Hansard, "Parliamentary Debates", 21 and 22 Victoria, Vol. 151, p. 102.

The foregoing remarks were made in support of a resolution putting the House of Commons on record as favoring repeal of the paper duty. *Mr. Disraeli* expressed no objection to the resolution as passed (p. 135). A summary of the origin of these taxes, almost identical to that by Mr. Milner-Gibson, quoted above, was given on May 24, 1855, in the House of Lords by *Viscount Canning,* on the second reading of the bill to repeal the newspaper stamp. *Hansard,* 18 Victoria, Vol. 138, p. 953.

So far was the real purpose of these taxes taken for granted, that even those who were opposed to their repeal based their opposition primarily on the ground *that such a restraint on the freedom of the British press was still needed!* Thus, *Mr. Bentinck,* in closing the debate on the bill to repeal the newspaper tax in the House of Commons on May 11, 1855, said:

"No advocate of the character of the press of this country could support this measure. He had never yet heard it argued that the press, able and enlightened as it was, was not in want of some check and safeguard against the ebullitions of party and personal feeling. Nothing could be more injurious to the character of the press, or of the public whom it served, than to take away the restrictions which had prevented not the liberty, but the license of the press, and the want of which would cause the country to be inundated with publications that would not only lead to the destruction of the character of the press, but would be attended by the most mischievous results in all large and populous communities."

Hansard, "Parliamentary Debates", 18 Victoria, Vol. 138, p. 450.

On May 6, 1861, *Mr. Baines,* speaking in the House of Commons for the repeal of the paper duty, summed up the prevailing sentiment in the few following words:

> "These taxes on knowledge ought never to have existed at all. They were altogether bad, and were originally intended to prevent political discussion and the spread of news."
>
> *Hansard, "Parliamentary Debates",* 24 Victoria, Vol. 162, p. 1593.

On May 21, 1860, on the second reading of the earlier bill for repeal of the paper duty in the House of Lords, *Earl Granville,* President of the Council, spoke as follows in support of the bill:

> "My Lords, I rise to move the second reading of a bill the object of which is to repeal a tax which has now existed for nearly 150 years. That tax, as stated in the Preamble of the first Act, was imposed for the purpose of enabling Her Majesty, Queen Anne, to carry on the war then raging, and it was to continue until she secured a lasting peace. Contemporary writers, however, inform us that the real object of the bill was, in conjunction with other taxes that were levied at the same time, to impose restrictions on the press, which was at that time thought too licentious."
>
> *Hansard, "Parliamentary Debates",* 23 Victoria, Vol. 158, p. 1439.

Lord Monteagle opposed the bill, and he was answered in a speech to the same effect as that of Earl Granville, an excerpt from which is quoted above, by the *Marquess of Clanricarde* id. p. 1495.

What is undoubtedly the most masterful legal presentation of the case for the repeal of these taxes was that of *Sir Edward Bulwer-Lytton* on second reading of the bill to repeal the newspaper stamp in the House of Commons on March 26, 1855. After stating that he "was the first person who ever introduced into this House a motion for the repeal of the taxes on knowledge . . . more than twenty

years ago", he proceeded, in answer to the contention that the matter of revenue was involved:

> "I cannot consent to allow the grand principle involved in this bill to be dwarfed down to the level of a budget . . . The principle is this—that you ought not in a free country to lay a tax on the expression of political opinion—a tax on the diffusion of that information on public affairs which the spirit of our constitution makes the interest and concern of every subject in the State."
>
> *Hansard, "Parliamentary Debates"*, 18 Victoria, Vol. 137, p. 1120.
>
> "Sir, the question really is between the tax collector and the public, and it is this—whether it is not time that we should enforce the great principle of the constitution of civil liberty and of common sense which says that opinion shall go free, not stinted nor filched away by fiscal arrangements, but subject always to the laws of the country against treason, blasphemy and slander."
>
> id. p. 1123.
>
> "It is superfluous to argue the principle that opinion should not be indirectly suppressed by a tax, when the boldest man among us dare not invade it by an open law; and, indeed, if we desired to do so, we have no longer the power."
>
> id. p. 1124.

The foregoing excerpts from the argument of Sir Bulwer-Lytton illustrate, admirably, the development of the English constitution in comparison to the express written provisions of our own. The repeal of the British newspaper taxes on the ground that Parliament "no longer had the power" thus to restrain the press, put into the constitution of England the same immunity against abridgment of freedom of the press, as was written into the Constitution of the United States by the First Amendment.

The bill for the repeal of the taxes on advertising passed the House of Lords without debate; but the debates

in the House of Commons on the advertisement tax are by no means lacking in sentiments similar to those expressed as to the other "taxes on knowledge". *Mr. Cobden,* on July 1, 1853, in the House of Commons, said:

> "It is a question of a tax upon knowledge; because if you want to have newspapers at all in this country, they can only be supported by funds furnished by advertisements."
>
> *Hansard, "Parliamentary Debates",* 16 Victoria, Vol. 128, p. 1108.

On the same date, in speaking for its repeal, *Mr. Milner-Gibson* characterized the advertising tax as being

> ". . . in short, an indirect and most effectual mode of crippling and restraining the press, and of injuring its independence. . ."
>
> id. p. 1096.

No clearer light can be shed on the inevitable effect of a tax on newspaper advertising than the comment twice found in the debates on the bill to repeal the English duty on advertisements in 1853. On the same date (July 1) on which the discussion recorded above took place, a statement by *Mr. Bright* is recorded (p. 1115) to the effect that "literally and virtually Mr. Timms (Solicitor to the Board of Inland Revenue) and his confederates at Somerset House charged with collection of the advertising tax were elevated into censors of the press" and acted accordingly.

Some months prior to the date of the foregoing discussion, on the introduction in the House of Commons by Mr. Milner-Gibson, on April 14, 1853, of a resolution "That the advertisement duty ought to be repealed", *Mr. J. L. Ricardo* is recorded as having stated that,

> "It had been said that the censorship of the press had expired sixty years ago: but he believed that Mr. Timms, the Solicitor to the Board of Inland Revenue (chief law officer in the collection of taxes) was in fact the real censor of the British press."

Hansard, "Parliamentary Debates", 16 Victoria, Vol. 125, p. 1168.

England has not been alone in using the device of taxation to restrain the press. After stating that "the English press may be said to date its complete freedom" from the time of the repeal of the various newspaper taxes, the *Encyclopaedia Britannica* (Vol. XXII, p. 300 et. seq.) gives the history of freedom of the press in other countries. It states that liberty of the press was completely re-established in France with the republic and the repeal of the newspaper taxes in 1870, and in Austria by the repeal of the *Kautionszwang* (caution money) in 1894 and the government newspaper stamp in 1899.

The newspaper stamp tax existed in Colonial Massachusetts but was repealed in 1785 as a result of agitation for a removal of this restriction on a free press. Strangely enough, it was followed by a tax (under the Bowdoin administration) on newspaper advertising, the fate of which is briefly and succinctly told by *Duniway* in his *"Development of Freedom of the Press in Massachusetts"*, p. 132:

> "At the same time, however, to make good the deficiency in the State's income, an advertisement tax was levied. Again the printers complained loudly of this restriction upon their business, alleging that it was an unconstitutional hindrance to that free development of the press which was essential to general diffusion of political information. Agitation against the obnoxious tax continued until its repeal was secured in 1788, after a House Committee had reported that the burden upon the printers was not compensated for by the small annual return of about £250 from the tax."

This tax on advertising in Massachusetts was set up as one of the reasons for the adoption of a freedom-of-the-press clause in the Constitution of the United States. (*Vide post.*)

Adoption of First Amendment

When the original Federal Constitution was adopted by the Convention in Philadelphia in September, 1787, it contained no bill of rights, and so strong was the feeling throughout the country against the new constitution unless a bill of rights were made a part thereof, that it never would have been ratified by the requisite number of states, had it not been for the promise that adoption of such a bill of rights, in the form of amendments to the constitution, would be made the first order of business of the new Congress, with early submission of the proposed new amendments to the states for ratification. This promise was kept, and on September 25, 1789, even before all the states had ratified the constitution itself, Congress adopted amendments containing a bill of rights, and these were in due course ratified by the states. To all practical intents and purposes, therefore, the first ten amendments to the Constitution of the United States may be considered a part of the original document. *Stevens, Sources of the Constitution of the United States* (1894), p. 213; Charles Warren, The Making of the Constitution (1928), pp. 509-510.

A freedom-of-the-press provision was proposed in the Philadelphia convention by Messrs. Elbridge Gerry and Charles Pinckney, but was defeated by a vote of 6 states to 5. Neither the journal of the Convention nor Madison's notes thereof, however, contain the debates on this provision, and while the matter was one of considerable discussion in the sessions of the state conventions called to ratify the new constitution, the meager available records of those sessions, contained in *"Elliot's Debates"*, also unfortunately fail to give the arguments. According to the Congressional Journal, the clause was adopted by Congress in the First Amendment to the Constitution practically as a matter of course, and without debate, and the journals of the legislatures of the several states show that this amendment was ratified by each in the same way.

The debates on the freedom-of-the-press clause in the Constitution of the United States, therefore, are to be found only in the recorded speeches and contemporaneous writings during the very active campaign for ratification of the original Constitution by the state conventions, when the Federalists, among whose leaders were Hamilton, Jay and Wilson, advocated its ratification as it stood, and the Republicans led by Jefferson, Lee and Smith, demanded a bill of rights as a condition precedent to ratification. All of the discussion was of course not recorded, and is accordingly unfortunately not available.

There can be no question, however, but that in the discussion, the demand for a freedom-of-the-press clause in the Constitution, was repeatedly, earnestly and forcefully urged, on the primary ground that its absence left the press open to restraint of its freedom through taxation. The Federalists argued that since Congress had no right to legislate on subjects not delegated to it for that purpose, and since it had accordingly no right to regulate the press, there was no need for such a protective clause in the Constitution. The Republicans simply answered that both the direct and implied powers of Congress were very broad, among those rights being an almost unlimited power of taxation, through which, as the history of England amply proved, the freedom of the press could be as effectively abridged as through censorship or licensing legislation.

It must be borne in mind, of course, that the argument of the Republicans prevailed, and the freedom-of-the-press clause was incorporated in the Constitution pursuant to their demand made for the primary purpose of prohibiting infringement of freedom of the press through taxation.

Among the outstanding figures in the Revolutionary period was *Richard Henry Lee* of Virginia, delegate from that State to the first Continental Congress convened at Philadelphia in 1774, where he introduced the resolution which he had drafted

"That these United Colonies are, and of Right ought to be Free and Independent States; that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved."

When, later, the *Declaration of Independence* was to be framed, and Lee, on account of illness had to return to Virginia, Thomas Jefferson took his place, and the foregoing language of Lee's resolution was embodied verbatim in that memorable document. Lee returned to Philadelphia in time to sign the Declaration.

Lee was appointed a member of the convention to frame a new federal constitution in 1787, but declined to serve. Thereafter, however, he took an active part in the discussion on ratification, maintaining staunchly with Jefferson the requirement for a bill of rights as a condition of ratification, as set out in the *Virginia and Kentucky Resolutions.* Lee's arguments are found in his *"Letters of a Federal Farmer",* and one of these contains his statement that the absence of a freedom-of-the-press provision in the new Constitution, left the people subject to abridgment of the liberty of their press through taxation:

"I confess I do not see in what cases the Congress can, with any pretence of right, make a law to suppress the freedom of the press; though I am not clear, that Congress is restrained from laying any duties whatever on printing, and from laying duties particularly heavy on certain pieces printed, and perhaps Congress may require large bonds for the payment of these duties. Should the printer say, the freedom of the press was secured by the constitution of the state in which he lived, Congress might, and perhaps with great propriety, answer, that the federal constitution is the only compact existing between them and the people. . ."

"Observations leading to a fair examination of the system of government, proposed by the late convention; and to several essential necessary alterations of it. In a number of Letters from the Fed-

eral Farmer to the Republican (N. Y.) Printed (by Thomas Greenleaf) in the year MDCCLXXXVIII, 8 vo—pp 40.

"Written by Richard Henry Lee, who was appointed a member of the Philadelphia Convention, but declined to serve."

Ford, Paul Leicester, "Pamphlets on the Constitution of the United States, published during its discussion by the people, 1787-1788", Brooklyn, 1888, p. 316.

Letters and pamphlets on the new Constitution of course abounded at the time it was before the several states for ratification. Among those having a wide circulation at the time, were the *"Letters of Centinel"*, believed to have been written by Samuel Bryan. In one of these the foregoing statement by Richard Henry Lee, received express endorsement. *Letters of Centinel, II, Pennsylvania and the Federal Constitution, Ed. by McMaster and Stone,* Philadelphia, 1888, p. 581.

Stevens, in his *"Sources of the Constitution of the United States"* (p. 218, 221), traces the origin of the demand for the freedom of the press clauses in the American constitutions to the laws and usages of England, and demonstrates the correctness of his statement by showing that the debates in Pennsylvania with reference to a freedom of the press clause in the Constitution of that State, just prior to the adoption of the First Amendment to the Constitution of the United States, pointed specifically to the English abuses.

In the light of the foregoing, the speeches in the controversy over the ratification of the Federal Constitution in Pennsylvania assume considerable importance in the instant discussion. The argument of the Federalists is summed up in an address delivered at Philadelphia on October 6, 1787, by *James Wilson,* who had been a delegate from Pennsylvania to the National Constitutional Convention:

"When the people established the powers of legislation under their separate governments, they in-

vested their representatives with every right and authority which they did not in explicit terms reserve . . . But in delegating foederal powers, another criterion was necessarily introduced and the congressional authority is to be collected, not from tacit implication, but from the positive grant, expressed in the instrument of union . . . This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed constitution: . . . For instance the liberty of the press, which has been a copious subject of declamation and opposition: what controul can proceed from the foederal government, to shackle or destroy that sacred pal'adium of nation freedom? If, indeed, a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been as necessary to stipulate that the liberty of the press should be preserved inviolate, as that the import should be general in its operation."

Ford, Paul Leicester, "Pamphlets on the Constitution of the United States, published during its discussion by the people, 1787-1788", Brooklyn, 1888, p. 156.

Prompt answer was made to Wilson, in an address at Philadelphia on November 3, 1787, by *Eleazar Oswald,* Revolutionary patriot and Lieutenant Colonel of the Continental Army:

"To the Citizens of Philadelphia:

"The important day is drawing near when you are to elect delegates to represent you in a convention, on the result of whose deliberations will depend in a great measure your future happiness.

"This convention is to determine whether or not the commonwealth of Pennsylvania shall adopt the plan of government proposed by the late convention of delegates from the different states which sat in this city . . .

"The objections that have been made to the new constitution are these: . . .

"The Liberty of the Press is not secured, and the

powers of Congress are fully adequate to its destruction, as they are to have the trial of libels, or pretended libels against the United States, and may by a cursed abominable Stamp Act (as the Bowdoin administration has done in Massachusetts) preclude you effectually from all means of information. Mr. W—— has given no answer to these arguments."

Address made at Philadelphia, Nov. 3, 1787, by "An officer of the Late Continental Army", reprinted in the "Independent Gazeteer", Nov. 6, 1787.

Pennsylvania and the Federal Constitution, Ed. by J. B. McMaster and F. D. Stone, Phila. 1888, p. 180, 181.

In the controversy in New York, the spokesman of the Federalists was *John Jay,* who had been a delegate to the Philadelphia convention. Jay published a pamphlet containing an argument almost identical to that made by James Wilson in Pennsylvania. Among the leaders of the Republicans in New York was *Melancthon Smith,* delegate from that State to the Continental Congress and the Constitutional Convention.

Smith had prepared a pamphlet on the proposed constitution, and when Jay's pamphlet appeared, Smith added a postscript to his own, for the specific purpose of challenging Jay's position on the freedom of the press, and of demonstrating that the absence of a constitutional provision guaranteeing this fundamental right to the people, left Congress free to abridge it through taxation:

"Since the foregoing pages have been put to the press, a pamphlet has appeared, entitled, 'An address to the people of the State of New York, on the subject of the new constitution, etc.'. . .

"'We are told (says the author), among other strange things, that the liberty of the press is left insecure by the proposed constitution . . . It is absurd to construe the silence of this, or of our own constitution relative to a great number of our rights into a total extinction of them; silence and a blank paper neither grant nor take away anything.'

"It may be a strange thing to this author to hear the people of America anxious for the preservation of their rights, but those who understand the true principles of liberty, are no strangers to their importance. The man who supposes the constitution, in any part of it, is like a blank piece of paper, has very erroneous ideas of it. He may be assured every clause has a meaning, and many of them such extensive meaning, as would take a volume to unfold. The suggestion that the liberty of the press is secure, because it is not in express words spoken of in the constitution . . . is puerile and unworthy of a man who pretends to reason. We contend, that by the indefinite powers granted to the federal government, the liberty of the press may be restricted by duties, etc., and therefore the constitution ought to have stipulated for its freedom . . ."

Postscript to

"An address to the people of the State of New York: showing the necessity of making amendments to the Constitution proposed for the United States, previous to its adoption. By a Plebeian. Printed in the State of New York; MDCCLXXXVIII, 8 vo —pp 26."

"Written by Melancthon Smith of New York, a member of the Continental Congress (1785-88), and of the New York State Convention, in which he opposed, but ultimately voted for the ratification of the new Constitution."

Ford, Paul Leicester, "Pamphlets on the Constitution of the United States, published during its discussion by the people, 1787-1788", Brooklyn, 1888, p. 87.

While the Continental Congress was in session, and before it proclaimed the Declaration of Independence, it recommended that each of the Colonies call a convention for the purpose of framing a state constitution. Such conventions were called in many of the Colonies and it is significant that in the State of Virginia, the Constitution which was adopted on June 29, 1776, or five days before

the proclamation of the Declaration of Independence, contained a provision

> "That the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments."

New Hampshire, Massachusetts, Pennsylvania, Maryland, North Carolina, South Carolina and Georgia all included provisions protecting a free press in their Constitutions which were ratified prior to the ratification of the Constitution of the United States. And following the ratification of the Constitution of the United States, all of the remaining thirteen Colonies adopted provisions to the same end.

Modern authority to the effect that the freedom-of-the press provision of the Federal Constitution was intended by its framers to prohibit taxation of the press as such is not lacking. In his work on *"Freedom of Speech,"* Professor *Zechariah Chafee* of the Harvard Law School, says:

> "It (The First Amendment) was formed out of past resentment against the royal control of the press under the Tudors, against the Star Chamber and the pillory, against the Parliamentary censorship which Milton condemned in his "Areopagitica", *by recollections of heavy newspaper taxation,* by hatred of the suppression of thought which went on vigorously on the continent during the eighteenth century." (Emphasis supplied.)
>
> *Chafee, Freedom of Speech* (1920), p. 32.

Act 23 of 1934 of Louisiana, therefore, in so far as it imposes a tax on advertising, is not a novel attempt at restraint.

Taxation as a form of restraint was conceived in England long before the revolution. It was used in the Colonies. For but a brief period, it was tried in Massachusetts after the revolution but promptly abandoned. It was not swept out of existence in England until after a

century and a half of struggle for liberty of thought and expression, liberty not repressed by taxation.

More than a half century before it was ended in England, taxation as a method of abridgment of the freedom of the press was forever barred in the United States.